DRAFT MEETING MINUTES
SENATE BILL 325 RULEMAKING COMMITTEE
Tuesday, June 21st 2016
2:00pm to 4:00pm
Metcalf Building
1520 E. Sixth Ave, Helena, MT 59620

PRESENT

Committee Members Present:
Jay Bodner
Barbara Chillcott
Dave Galt
Adam Haight
Art Hayes, Jr. (phone)
Derf Johnson
Tammy Johnson (phone)
Brenda Lindlief-Hall (phone)
Peggy Trenk

Montana Department of Environmental Quality Staff Members Present:
Rainie DeVaney
Myla Kelly
Adam McMahon
Kurt Moser
John North
Timmie Smart
Amy Steinmetz
Mike Suplee

Members of the Public Present:
Mark Staples
Doug Parker (phone)

Ms. Myla Kelly called the meeting to order at 2:03 pm. The meeting commenced with introductions and followed by a re-cap of the May 17th meeting. Ms. Kelly explained that from that meeting DEQ decided to develop the draft rule and guidance for Part 2 of the statute following the case by case approach where the rule was going to be less specific and the guidance would include the predominant amount of the technical details. This will give the workgroup opportunity to comment on the comfort level with this approach. Ms. Kelly said DEQ has drafted these and will go through them during the meeting.

Also at the last meeting work began on Part 1, and the dissecting of the three sentences that make up Part 1. The group also discussed performance based approach, what it means on a parameter by parameter basis, and the different components that would make up that rule. These would include the determination of the anthropogenic versus the non-anthropogenic contributions of a pollutant, as well as the data needs to make that determination, the consideration of how to choose a number or criteria once you have that robust data-set, and consideration of nondegradation policies that go with it. Ms. Kelly said that today DEQ will provide some draft Part 1 rule language associated with that. She asked if anyone had changes to the minutes. Ms. Trenk noted 2 edits to be made before approving the minutes.

These edits were noted and will be made to the minutes, which DEQ will post to the website.

Ms. Kelly said another question from the last meeting was whether an individual variance was grantable before SB325. DEQ confirmed that yes, it was grantable, but had never been done before.

Ms. Kelly continued with an additional question asked since the last meeting on whether there were any implications from the recent lawsuit with EPA on the second part of DEQ's variance in SB325. John North from DEQ's legal department explained the lawsuit filed by Upper Missouri Waterkeeper against the EPA. He said the BER adopted numeric nutrient standards back in August of 2014 and that they are also subject to a general variance and individual variance process that were placed in law by the legislature, which set numbers for at least the first three years of a variance and can be in effect for up to 20 years, subject to review. EPA approved this rule package, including the variance, in January of 2015. There is now a lawsuit filed by Upper Missouri Waterkeeper in federal district court in Great Falls, challenging the variances. There are 3 counts in the lawsuit:

1. Challenges the ability of EPA to issue variances.
2. Challenges the level that the legislature set the variance at, saying it violates EPA rule which requires a highest attainable variance level and that rule was not in effect at the time the BER adopted the numeric nutrients standards or when the legislature passed the law, or when EPA approved the variance process and the rules. This went into effect about 6 months later. There is an allegation that the rules simply reflect EPA's previous policy.
3. Challenges the economic analysis that the variance was based on, saying that a variance can be in effect if there is widespread economic harm that would result in compliance with the standards. It simply challenges the economic analysis.

The lawsuit asks for the district court to strike down the variances as arbitrary, capricious and unlawful. The lawsuit was filed at the end of May and EPA has 60 days to respond, sometime around the end of July or early August. Mr. North said this would have no effect on SB325 at this current time while the lawsuit is coming. There is no application for an injunction so the numeric nutrient standards and the variance would remain in effect during the lawsuit. Mr. North has been in touch with the EPA attorneys in Denver. He said when EPA attorneys go to court, they don't represent EPA. At that point it's the Department of Justice (DOJ). When Mr. North spoke with them last week they had just gotten their DOJ attorney appointed, and they were meeting with this attorney and with their office of general counsel. They were going to call Mr. North after the meeting. He said DEQ's current thinking is to intervene to defend the process and the variance. The response is due at the end of July or beginning of August, so this intervention would probably (most likely) come at the end of July so that DEQ could respond with an answer to the complaint at the same time that EPA responds.

Mr. North asked for questions. Mr. Galt asked if Mr. North was aware of other interveners. Mr. North was not. Mr. Galt said that what Montana did with nutrients was leading edge and he wondered if Mr. North had a sense of impacts nationally on what's driving the Upper Missouri Waterkeepers (to file the lawsuit). Mr. North said he did not. Ms. Trenk asked if there were similarities in the variance process this workgroup is talking about with SB325 and the nutrient variance. Mr. North said they are based on different grounds. The variance process in the nutrients standard is based on widespread economic harm. There are different grounds for a variance when talking about a stream that isn't meeting standards and can't be brought up to standards until remediation occurs. Ms. Kelly asked how the workgroup could stay current on the status as DEQ's challenge to the lawsuit progresses. Mr. North said to just give him a call at 444-2018.

Ms. Kelly moved onto the next agenda item of reviewing the draft rule and guidance for Part 2 of the statute. Mr. Mike Suplee explained how in the last meeting the workgroup said it would be easier for them to figure out (which approach they prefer) if DEQ aligned the streamlined version with the case by case version of this approach for Part 2. This would give the workgroup material to look at and sink their teeth into. Mr. Suplee said that DEQ took Part 2 (which in the handouts is labeled in bold **NEW RULE),** which looks like earlier versions the workgroup has seen before. The main things that DEQ has added are pieces and parts that point to guidance because we are making the assumption this will be based on guidance. This is in the first paragraph where it says *The applicant must demonstrate to the department that one of the six factors at 40 CFR 131.14(b)(2)(i) apply. The demonstration must consider any guidance developed by the department or EPA.*

Mr. Suplee continued on to Part (2) which says the department will consider if other things preclude the need to do this. If the department finds there is some alternative, they will consult with the applicant. Then in Part (3), the department will consult with the applicant and if there's no other alternative, the department will determine if the information provided was adequate to demonstrate the need for the variance. *The department shall approve a discharge variance which reflects the highest attainable water quality condition*. Mr. Suplee said this will be discussed more in the guidance but basically that means something like background. But this is presuming the water quality of the stream is above standards but because of some longstanding condition it may be remediated. Mr. Suplee moved onto the next sentence: *The department shall consider any guidance developed by the department or EPA when establishing the highest attainable water quality condition.* This sentence again includes more guidance.

Part (4) talks about how the variance will be reviewed every 5 years. If the water quality has improved over the last 5 years due to remedial activities, then the permittee will need to track that water quality with their facility as characterized over the previous 2 years. Mr. Suplee acknowledged there has been some concern about having to plan for upgrades that go over much longer periods of time and that these steps may be too quick, but that is part of the guidance that hasn't been developed and will need to be discussed. But for now it's left as it was from the earlier versions. Mr. Suplee explained the basic idea is that as remedial activity improves, DEQ doesn't want the waste water facility to suddenly be the last remaining person out there causing the water quality to deteriorate. They should track the improvements.

Mr. Suplee continued that the idea is that DEQ would go to the guidance. Her referred the group to a handout of the guidance and stated that the handout would be sent to the workgroup electronically after the meeting. There are place holders for topics the workgroup has discussed and will need more details. There is a flowchart that shows what is mostly in statute. The figure summarizes the basic flow path of activities an applicant should or must be considering when determining if the applicant's variance is applicable. Mr. Suplee explained the steps of the flowchart

- Is the condition likely to be remediated in the next 5 years? If it is, you're done because the statute says you don't get a variance.
- Does another permit-related action in place preclude the variance? If yes, then you're done but you don't have to be done. You can still pursue the variance but the question becomes do you really need to at that point?
- If there is nothing in place, would one of the 40 CFR 131.14(b)(2)(i)(A)(1) factors apply? (1 of the 6 factors, which will be discussed). If one does not apply you are also done because no variance is allowed based on the statute.
- If one does apply the question is: Will the discharge materially contribute to the condition,

based on procedures in DEQ guidance? (this will be discussed) If it does, no variance. If it doesn't, you can apply for a variance.

Mr. Suplee said that this is to give everybody an idea of what the basic process looks like. Further into the document are the details, which Mr. Suplee said he would touch on the highlights of what has been seen before and what is still open-ended and needs to be considered as the workgroup looks at the guidance. A lot of these things have been spread out and seen over a long period of time, and this document has it all in one place.

Mr. Suplee continued with the next part of the document:

2.1 Will the Condition be Remediated? Essentially DEQ's Waste Management and Remediation Division http://deq.mt.gov/DEQAdmin/about/DEQStaffDirectory#rem is the place to go check to see if anything is happening in that watershed with regards to remediation.

2.2 Other Permit-related Actions- There are only two places at DEQ where one would look for this information. One is the TMDL program, which there is a contact given (on the handout). And also the permit writing shop- most dischargers know who their permit writer is and they can talk to them. One of those 2 people and some combination thereof should be able to tell them what's going on. Mr. Suplee recommends not to read the TMDL, mostly because they're really thick, complicated documents that are hard to get through. You might be better off to get what you need to know by going right to the folks who wrote it because they'll know what the story is or will be able to track it down in the 200 page document quickly. Mr. Suplee said that you can read it, but a lot of time can be spent going where you don't need to go.

2.3 Does one of the Six Factors of 40 CFR 131.14(b)(2)(i) apply? They are listed on the handout and are right out of EPA's regulations. Mr. Supplee said DEQ has had discussions about this and doesn't say you can't use them, but they can't tell you which ones they think are most likely to be successful. Mr. Suplee went over DEQ's explanation for each one: (which are explained further down in the handout.)

- Factor 1: This one will be addressed in Part 1 of this rule, which Ms. Steinmetz will discuss.
- Factor 2: Natural, ephemeral, intermittent or low flows prevent the attainment of the use. This is really not what this is about. There could be a situation where it applies, but DEQ can't foresee it. So DEQ says to DEQ's knowledge, not generally applicable to the situations that 75-5-222(2), MCA was written to address.
- Factor 3: It may apply, but has not been accepted so far as a variance rationale by EPA. Further, the exact means by which an applicant would carry out the demonstration is not clear. So DEQ says if you're going to go down that road, come and talk to us. Give us what you have and DEQ will give them their best thought of what they think it might look like.
- Factor 4: Addressed by other laws that DEQ already has (75-5-306, MCA and ARM 17-30-636). It's about dams, diversions and other types of hydrologic modifications, and again it's not really SB325 stuff.
- Factor 5: Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, etc. prevent attainment of aquatic life. Again, this is not really what this workgroup is talking about. Maybe there will be a situation where it could apply, but DEQ says again it's not really the big hitter.
- Factor 6: Mr. Suplee says we focus more on Factor 6, which is the economic cost of trying to meet the water quality standard end-of-pipe when the stream is actually above that standard.

Mr. Suplee explained that DEQ pointed to a place where they have done some very substantial development of how we do substantial and widespread economic analysis. He referred to the Base Numeric Nutrient Standards Implementation Guidance document that can be found on DEQ's website at http://deq.mt.gov/Water/WQPB/Standards. Mr. Suplee said this was developed as part of the rulemaking bill DEQ is being sued on right now, but he wanted to point out Section 3 of the document titled Guidance Pertaining to the Evaluation Process for Individual Variances. This whole section, both public and private gives all the details one would need for the process. Whether it's nutrients or lead or whatever, it doesn't matter. The cost evaluation process is identical. The spreadsheets you would use to make the evaluations are identical. Rather than put all of this into another guidance document, DEQ will point to this document. Mr. Suplee doesn't believe there is a need to bring it into the guidance document the SB325 workgroup is working on since this is available. The spreadsheets that may be needed are available from DEQ and are available for anyone who wants to get into that level of detail. They have just been upgraded with the latest economic statistical data from the state. The data changes with the census and is updated about every 5 years to reflect the latest conditions.

Mr. Suplee moved onto the next topic of how to determine if a variance is appropriate.

2.4 Determining if the Discharge will Materially Contribute to the Condition- Each situation will be different and the exact methods DEQ may use will vary. This is not very concrete, but DEQ has said that pollutants will be grouped as carcinogens, toxics or harmfuls and each grouping will be treated according to the properties of the pollutants within the group, basically being more worried about carcinogens versus toxins versus harmfuls.

Next Mr. Suplee explained Figure 2-1 of the handout that has information the workgroup has seen at previous meetings. There is a waterbody that has Legacy Mining in the upper left of the illustration. Mr. Suplee said that even if the point source were not there, the entire stretch shown in red (**Figure 2-1A**) would have been above standards due to the Legacy Mining.

Mr. Suplee explained the next scenarios (**Figure 2-1B**) where the point source is in the watershed but the longitudinal extent of the river with pollution has not changed. That's one scenario. Then there is the other scenario (**Figure 2-1C**) where, because the point source is putting out a fairly high volume or concentration or both of its pollutant, it actually has extended the distance over which this problem has occurred. This scenario may or may not be considered materially contributing depending on how high the magnitude of the increase is within the already impacted section. The question then is how much is too much, and we don't have a black and white answer for that. This one is a little bit more black and white. Any situation where the longitudinal extent has been extended due to point source would be material contribution.

Mr. Suplee said these are all things that have been discussed in past meetings. It's explained in the footer for the figure and also in the text (of the handout). Mr. Suplee also put in "there are no hard and fast rules regarding how much is too much above". This is a rule in regards to this scenario where it hasn't been extended longitudinally but the concentration throughout here is somewhat higher than it was if the point source wasn't there. But again, DEQ has no hard rules on how to decide if that's too much. As a guide, DEQ would be looking at what the type of pollution was. Mr. Suplee said DEQ also added that they will use discretion, on a case by case basis, to determine what is reasonable when carrying out its evaluations. For example, it may result that a point source only extends the non-attainment reach for another 100 meters. Mr. Suplee explained this small difference could probably be considered as "not materially contributing". As opposed to an absolute black and white line whereas it's

going to extend the problem another 10 kilometers, that's material contribution. There is a gray zone in there where we can have a conversation.

Mr. Suplee said that DEQ wrapped up by saying that if the applicant is demonstrating one of the 6 factors, and has met the other conditions of the statute they are eligible to apply for the variance.

Mr. Suplee repeated this is nothing new and all stuff the workgroup has seen, it's just all in one place. Or you can go to another document and really get into the details of what DEQ thinks is the most useful of the 6 factors from the applicant's point of view, they can apply through factor 6.

Mr. Suplee pointed out the next section of the handout that is still very much in development- Section **3.0 Dataset Minimums to Carry Out Section 2.0 Evaluations**. Mr. Suplee said he hasn't put too much work into that, but will take a good first stab at it before the next time the workgroup sees the document. Also section **4.0 After the Variance: Guidance on Characterizing Upstream Water Quality Over the Previous Variance Period.** This points to the last part of the rule, Part 4, where DEQ talks about looking at the improving water quality, if the remediation is occurring and characterizing the ambient upstream water quality every 2 years. There were questions last time about how do we do that, how many samples do you need, all that stuff. That's what's going to be worked on. That's an area where if the workgroup has thoughts or comments on this that they feel strongly about, just forward them onto DEQ and they will roll those in. This is a place holder for those.

Mr. Suplee said he thinks that's everything the workgroup has talked about so far that could potentially have gone to rule but is in guidance now or is being developed in the guidance. Some stuff needs a lot more detail, and some of it's very detailed once you get into the other document.

Mr. Suplee asked if there were any questions. Mr. Jay Bodner asked about **Figure 2-1B** and asked to be walked through how this would work with the applicants so they would increase some of that, but they're not extending the area. He acknowledged that Mr. Suplee said a conversation would occur and Mr. Bodner wanted to know how the conversation would work. Mr. Suplee said that DEQ has some guidelines: Is the pollutant of concern a carcinogen vs. a toxic vs. a harmful? Obviously, if it's harmful, DEQ is not going to be as worried or concerned about it if it was toxic or a carcinogen. For example, maybe if it's a carcinogen, and somewhere in that red zone **(Figure 2-1B)** the carcinogen is elevated a significant amount, maybe that's a concern. The whole question of one molecule above where an ambient is right now- is that important? Mr. Suplee said that unfortunately he is not coming up with any clear answers for the workgroup. But by at least putting our pollutants into categories, we can logically evaluate what's really important and what's less concerning. Then when you get into the details of the situation you look at how much above the ambient is the point source pushing the issue, and go from there. Mr. Suplee said he can't give a number like, if it's 1% it's all good and 5% it's bad, and that unfortunately, DEQ hasn't been able to come up with anything much better than that at this stage.

Mr. Galt said he understood that there's got to be discretion, but it seems that's the root of a lot of delay and lawsuits. There's got to be concern on both sides. Mr. Suplee said there's more room to flesh that out and this is the place where we can work on that. It's all in one place now. DEQ hasn't gotten very far in those details yet and has been very hesitant to give a percentage for something like that. Mr. Suplee added that he's not very sure they ever would.

Ms. Trenk asked if the workgroup went with the streamlined approach, would you have to be that specific? Mr. Suplee said he thinks we probably would, because at that stage the BER would only see

this process once. So if they didn't see enough detail in there they may never want to adopt it. They might tell us to go back and put these details in so that the BER can consider what the implications will be of passing this process that they'll never see again. And then of course the EPA still has the case by case review anyway. He said Ms. Trenk characterized it exactly right, that we would need that detail. Whereas with the case by case approach, we could get away with a less detailed document, or one that we can detail to the degree of what we can ultimately live with, and leave it at that.

Mr. Suplee said that when it came to nutrient standards, there was a lot of stuff that toggled back and forth between rule and guidance at the end and it got traded down to what we can ultimately live with. Ms. Kelly added that the scope of this variance process is much broader because we're not just talking about one particular parameter. Mr. Suplee said that yes, there are a lot of "what-ifs" so it makes it harder.

Mr. Suplee said that the rule and guidance document are a work in progress, that there is more to be added in some sections for sure and perhaps some more details in others. Mr. Bodner referred to the areas Mr. Suplee spoke about and where to see if there is remediation happening and asked if the applicant calls and says that they are not really sure if they're checking all of the boxes, is there someone at DEQ who can walk them through the process? Mr. Suplee said that would be someone in Water Quality Standards (DEQ) because variances are standards-changed activities so they fall in the standards shop, by and large, especially the individual ones. The general ones like those that are done for the nutrient standards, those are smoothly processed by permitting because they were built that way. These individual cases would go to Standards. Ms. Kelly asked if Mr. Bodner was wondering if he had a specific question on a watershed, if there is a TMDL in place or in development, or what the priority was for writing a TMDL, or if there is a remediation action happening- where would he start? Mr. Bodner said he thinks that's the worry he would have, if remediation was starting. He said it is kind of tedious to go through some of the TMDL work and that it's easier to just to call someone and ask. Mr. Bodner acknowledged that this was referenced (in the Implementation Guidance document that Mr. Suplee went over). Ms. Kelly said those references and Standards would be the first place to start (when contacting DEQ). Mr. Suplee added that we can make that clearer in the document, having a list of contacts with a list of positions within the Standards section that would be the person to go to.

Ms. Kelly said that in the next couple of weeks, if the workgroup could take some time to go through the draft guidance document, to please get in touch with DEQ with comments. The document will be emailed to the workgroup.

Mr. Galt referred back to the drainage maps and **Figure 2-1B** to clarify the scenario. Mr. Suplee said it could be that the point source is so small and it's not a really big deal so it's not important. Or it could be a case where they have really raised this above background ambient that had originally resulted from the Legacy Mine, but of course it didn't extend it longitudinally. Either of those situations can apply here. Mr. Galt asked if the additional point source didn't change the use of the water that reaches the red (area on the map), that it would be insignificant? Mr. Suplee said that's part of what DEQ would evaluate. He said this is where it gets tricky because there is a use there and the use is impacted because the standards aren't being met. So the question is if the standard is even further impacted, how much more is that use impacted? That will vary to some degree, depending on the pollutant. Like with a carcinogen, which basically has no end point- the more the worse. That is a significant consideration. Some compounds have something of a threshold effect where you get up to a certain point, it really doesn't matter if you add more of them, you're not going to get a whole lot more effect locally. Nutrients tend to behave that way- once you get up to a certain amount of nutrients in a system it's

saturated. So those are the kind of use/standards/where we are relative to background ambient that we'd be looking at. But again there is no detail in here at this stage, just the concepts.

Next, Ms. Steinmetz began with a summary of the last meeting talking about the Alaska Rule, and the email she sent with a link to it. Ms. Steinmetz summarized that the workgroup has options on how they can develop site-specific criteria based on natural if they're necessary. The performance-based approach is one option. This is a very detailed process and calculation that could be adopted in rule as a water quality standard and used to generate criteria without having doing additional rulemaking. Another option is a general performance-based approach which would still be a process but with less detail and would not be adopted in rule, but could be used to generate criteria that would then have to go through rulemaking. The third option is an individual site-specific standard like the Otter Creek site specific electrical conductivity and sodium adsorption ratio standards that DEQ had worked on.

Ms. Steinmetz continued, saying that the rule (draft-version hand out) is a general process and general requirement that would just get you to that performance-based approach. Ms. Steinmetz walked the workgroup through the handout, saying that first of all they needed to define non-anthropogenic. DEQ has their definitions for natural, but needs a definition that's consistent with EPA's definition. The top paragraph is the first stab at defining non-anthropogenic: *the background concentration of a parameter in surface water or groundwater due to only non-anthropogenic, non-human induced sources.*

Moving on in the handout, Ms. Steinmetz said that DEQ hasn't used performance-based approach or methods before, so it's a new concept and a definition of performance-based method or approach would be helpful in our rule. She said this is again a first stab at defining performance-based method as *an adopted water quality standard which is a specific process that defines a methodology leading to and describing implementation of a numeric water quality criterion. It may be used for the derivation of site-specific numeric criteria or for interpreting narrative criteria into quantifiable measures.*

Ms. Steinmetz said that these are a couple of definitions that would need to be incorporated into the rules before the workgroup would be able to use this performance-based method or performance-based approach.

Ms. Steinmetz moved onto the NEW RULE that follows the two definitions. The first section says that performance-based methods will be developed for parameters as necessary to facilitate the development of site-specific criteria where MCA 75-5-222 applies—that is, if you have a situation where the current criterion is more stringent than the non-anthropogenic condition of the water body. The draft rule language would give the authority to use a performance-based approach. Ms. Steinmetz continued with minimum data needs, which are going to be very individual per parameter, but at a minimum DEQ would need to make sure that they have sufficient representation of seasonal, temporal conditions. The same goes for spatially distributed data- DEQ needs to make sure they know what's happening where on a water body, that they're bracketing any kind of potential anthropogenic sources. This all needs to be defined. The beneficial uses also need to be clearly defined.

Ms. Steinmetz moved onto the last item in the list that says *"All potential anthropogenic contributions of the parameter(s) must be described".* Again, we need to know what's going on in the watershed. Ms. Steinmetz said she is sure there are other data needs that she doesn't have listed yet, but is sure will come up in further conversation.

Moving on from data needs to the non-anthropogenic condition of a waterbody- Ms. Steinmetz said the

workgroup has talked a little bit about this and has gone over different methods of determining anthropogenic vs. non-anthropogenic. We might be able to use modeling, or a reference approach where we've got a lot of good data on a reference stream, and look at that as our non-anthropogenic condition. We may also be able to use mass-balance loading, and there are other approaches that may be appropriate as well. DEQ, BER and the applicant would approach this on a case by case basis.

Ms. Steinmetz next covered site-specific criteria calculations which will be based only on the non-anthropogenic condition. We would tease out what's anthropogenic and non-anthropogenic and the anthropogenic portion of that pollutant in the waterbody is not included in the calculation for a site-specific criteria based on natural. We would exclude any anthropogenic sources. Ms. Steinmetz said the next statement at the end of (4) - *Beneficial use protection will be considered when determining an appropriate method of calculating the site-specific criteria*. She gave the example of Otter Creek where we were looking at irrigated agriculture that happens at a very specific time of year, with very specific water quality conditions that are on the cleaner end of that distribution of natural data. If we were to just across the board say that we're going to choose a higher percentile, that might not work for agriculture; whereas for aquatic life, that might be fine. So we do need to know what uses are present and what we're protecting before we can decide on a calculation or a method of choosing that number that's going to be spit out of this performance-based method.

Ms. Steinmetz moved onto the last piece that's included in this draft rule that says (5) *The performance-based method must include, in addition to data needs and a specific calculation to derive site-specific criteria, specific procedures for implementation of the resulting water quality criteria. T*hat could be implementation in assessment, permits, or how would use the number for setting clean-up levels for remediation, for example. We need to know how that number's going to be used. Not addressed is non-degradation, but we will have to figure that one out, as well. How are we going to determine significance for non-degradation review purposes? And the last part of the sentence is that we need to *ensure protection of downstream water quality standards*. This comes right out of the statute.

Ms. Steinmetz said that's what is in the draft rule, and some things that at this point have been decided to not include in the rule because they may not really be necessary, but *(6) if the BER determines that the performance-based method is detailed enough, has suitable safeguards to ensure predictable, repeatable outcomes the board may adopt that method as a water-quality standard* which was talked about a little bit. Next Ms. Steinmetz touched on *Site-specific criteria calculated from the method must go through a public participation step*- this is required by EPA and we would require it at the state level. Ms. Steinmetz was not sure what it would exactly look like, but thought it would look like the rulemaking process where DEQ goes out and publish in newspapers and send out letters to water quality standards interested parties, making sure that anybody affected knows what's happening and that we can get this participation from the public. *The department must maintain a publically available, comprehensive list of all site-by-site decisions made using the performance-based methods.* Because those things are clarified and specified in the Federal Register, Ms. Steinmetz said she did not think the workgroup would need to include them in State rule. Mr. Kurt Moser from DEQ legal said that he would look at this some more.

Ms. Steinmetz moved to the last item on the list that talks about the general performance-based method. She said if the board or DEQ decides that this method doesn't have enough specificity, then it can be a general performance-based method that would not be adopted in rule, but it could still help guide review—it could still help the board assess whether or not the criterion is appropriate—but we would have to go through individual rulemaking with each new criterion and make sure that the board

was provided with all of the information specified by the method in the final rulemaking package.

Ms. Steinmetz asked for questions or if she left out any detail. Ms. Trenk asked about the public process for input, saying how the workgroup develops a procedure and goes through the board and that's very detailed and DEQ takes input. But she wondered how the department decides what they'll apply and what they won't. Will they just decide that this is what we're going to do? Or is there a public notice and a hearing? Ms. Steinmetz did not think there was a requirement for a public hearing. DEQ would want to do a notice just so that people were aware of the development of the criterion, but would probably not schedule a public hearing unless one was requested. Either way, DEQ would weigh the comments that were received as a part of that public process. Mr. Moser from said that in rule you would have to specifically detail that.

Mr. Doug Parker asked if the department has considered another approach instead of this very process-heavy thing going to site-specific standards? He said it seems that one could read the words in the MCA that says that if it's non-anthropogenic, then that is the standard. Why does the department determine that we have to have site specific standards and go through this entire process to have a rulemaking process to have that be the standard when it's already indicated in the law that is the standard? Ms. Steinmetz said that she views that interpretation of the statute in being in direct conflict with MCA 75-5-301 that states that the board has to adopt water quality standards including numeric water quality criteria. Mr. Parker said that interpretation would mean that one portion of the law trumps another portion of the law. He asked if there was some sort of rationale for making that (decision). He understands why DEQ wants to do that, but he wants to make sure that DEQ has looked at the option that you need to do what the law says.

Mr. Moser said that the important piece to this is the EPA approval piece. He referred to the Alaska Rule that the workgroup has talked about, and that EPA has to approve any standard and what is really being talked about. We have to have EPA approval which has said they will go this performance-based approach idea. This is effectively then the standard. Then we don't have to go back to EPA, we just have to have a process when we develop this specific criteria. Mr. Moser said it's really about that, and since EPA can fundamentally object to any permit, and DEQ can't issue it then, they do have a fair amount of control in the process. He said we do have to get through that problem and that is why we're looking at it this way. Mr. Moser told Mr. Parker he agreed that it looks like the legislature adopted something that looks like a standard in a way. But we have to interpret it in a way that comports with our requirements under Federal law, too. Mr. Parker clarified what he thinks Mr. Moser said, that if you establish that performance-based process as a "standard" you're still adding on this initial step, or steps, of going to the board. He was not sure if that was necessary. Mr. Parker said it's certainly necessary to have a process defining what those values are, but then it seems that one interpretation is that once you set up a process that is, for simplicity sake, the number, then that number is self-implementing.

Ms. Kelly said she thinks that we are saying the same thing. She said once the process is developed or once it's approved by EPA and the board, say the calculator is approved, then the public participation process for the number that the calculator spits out does not necessarily have to include going to the board for rulemaking. But it does need to be transparent and put on our website. But that site-specific number that comes out would not have to go through the rulemaking process. Mr. Moser agreed, saying the board would essentially be approving the process. Ms. Kelly added that as long as that is approved by the EPA and the board, that calculator and process is approved. But the site-specific criteria that are calculated will need to be publicly available. Ms. Kelly said DEQ doesn't know what that public outreach would need to be. It might be done by notice but not need to be done by rulemaking.

Mr. Derf Johnson asked how this was going to address cumulative impacts when you have multiple dischargers. He asked if they would be taken into account, especially if still within that 5-year window? He referenced Part (2d) under **NEW RULE** *looking at all potential anthropogenic contributions of the parameters must be described*, he asked if this is forward looking. He next referenced (5) when looking at data needs and performance-based procedures, he asked if potential dischargers and cumulative impacts are included in this analysis as well. Ms. Steinmetz said that the data needs, the potential anthropogenic contributions, when looking at that, it is so we can take it out of the calculation for the criterion. We don't want to include anthropogenic sources in the criteria. She said DEQ is developing a criterion, not an effluent limit. We would then use that criterion then to develop effluent limits and that's when those cumulative effects would be taken into consideration. We would want to outline in implementation how to incorporate those numbers in the permits. Mr. Johnson asked if by implementation, Ms. Steinmetz meant permit specific. Ms. Steinmetz said yes, that the development of the criterion is going to be completely separate. The development of the permit limit later on, considering different sources and cumulative effects, is a later step. But we want to take out any anthropogenic influences up front when determining what the criterion should be.

Mr. Johnson said that DEQ is talking about providing exemptions (variances), that multiple people will receive exemptions. Based upon where the non-anthropogenic standard is, how will DEQ assess that? Will that only be in the permitting stage or something more initial? Ms. Steinmetz said the site-specific criterion would be limited to a very specific stream or watershed or portion of the stream. That's the only place where that criterion would apply. Mr. Johnson said if you're allowing discharges up to a certain extent, above background and non-anthropogenic, how many people receive that exemption? Ms. Steinmetz said that based on the site-specific criterion based on non-anthropogenic, DEQ wouldn't be allowing discharges above background. She thought that maybe Mr. Johnson was stacking the variance piece on top of the site-specific criterion. Ms. Steinmetz said that's not part of Part 2. Part 1 of the statute just addresses the non-anthropogenic condition. DEQ wouldn't be allowing anyone to go over that.

Mr. Suplee gave the example of how DEQ has been looking at iron in eastern Montana that DEQ has a fair amount of data on from our reference sites. He said the standard for iron is 1000 micrograms/liter. But DEQ sees lots and lots of places in their reference sites that they spend a lot of time identifying that have little to no anthropogenic influence, where it's 2000, 3000, 4000 naturally at the point sources with a little grazing, etc. So that would be a case where the criterion would be backed out using this process, so maybe the new standard for this particular stream is sitting at 3000, while what's on the books right now is 1000. Then the permitting folks would go ahead and develop their permits via the normal process at 3000 instead of 1000. He asked Mr. Johnson if that helped and Mr. Johnson said yes.

Mr. Parker followed up by asking about the department working on the arsenic situation in the Yellowstone. He asked if that process was far enough along that DEQ can bring it forward as an example for this workgroup to look at. Ms. Kelly clarified if what he meant was natural levels of arsenic in the Yellowstone. Mr. Parker said yes, that DEQ was basically doing something analogous to this performance based methodology that DEQ could run through what DEQ is doing, what the data says, and how it's being pulled together. If the workgroup could see that example and how it would affect discharges, it would be useful. Ms. Kelly said that the approach that Standards is using to figure out the non-anthropogenic levels is sort of a mass-balance approach that was talked a little bit about at one of the very first sessions, and said they could do a demonstration of how they've been calculating that. She said that they haven't tied any of it to implementation parameters yet or any permitting, or

assessments. They are still in the phase of what are the numbers and what is the mass balance showing us and can they demonstrate that this is natural? She said if the group was interested they would share this information. Ms. Barbara Chillcott said that it would help to have some real world examples.

Ms. Kelly went back to Mr. Johnson's question, clarifying if he was asking what would the case be if there were multiple dischargers and how DEQ would assess the cumulative impacts. Mr. Johnson said his question was about the multiple applications for exemption. Ms. Kelly asked for a variance and how it would be calculated? Mr. Johnson said yes. Mr. Suplee said he thought Mr. Johnson was mixing things up, that Part 2 of the rule goes on to talk about situations where all this stuff the group just talked about doesn't apply. It's presumed that the pollution we're seeing in some watershed is caused by people. Mr. Suplee said that's all the stuff that he was talking about. He asked if Mr. Johnson if he is asking if there were multiple people in that scenario? Mr. Johnson said yes. Mr. Suplee didn't know how DEQ would do that, but that DEQ would have to figure it out. The group pointed out section (5) in Part 1 under **NEW RULE** to *ensure protection of downstream water quality standards.* Mr. Suplee said they put it in Part 1, but thought it would also apply to Part 2. He said that regardless of any standard or criterion DEQ develops they would end up saying something like that. It's kind of an EPA requirement. He referred to the nutrients standards. He stated that there is a footnote that says you need to consider the maintenance of downstream water quality standards when implementing x, y and z. One way or another that concept can end up in Part 2 as well. That would address the cumulative effects.

Ms. Trenk wanted to clarify her understanding and referred back to the stream stretch in **Figure 2-1B.** There is the naturally occurring pollutant—not the first point source discharger—where it's been figured out what the natural condition is. A variance isn't needed because it's already been figured out what the new standards should be. Then in 2 years another person wants to do something on that stream at the point source and they get to live with that new standard, too? Mr. Suplee added that there's nondegradation, too. He said this is the main place where the new discharger would get held. If the standard was originally 1000, and the discharger is already there, and then they are told they only need to treat to 3000 because that's what the natural background is. A brand new discharger coming in would have to treat to some fraction of that 3000. That's a harmful parameter in this particular case and that's how they're handled now. Presuming that they'd be handled similarly going forward, then they would be asked to treat to maybe 1000 or less, depending on the situation. They are only supposed to bring it up a little bit. They can't just go right to the standard. If they were an existing discharger, like Ms. Trenk mentioned, than it's different.

Ms. Trenk asked, referring back to **Figure 2-1** that even where the red line stops at the end with 3 dischargers, you are still back to 1000? Mr. Suplee wondered if it was getting "a bit fuzzy". He said that we've been talking about natural background and then we've talked about Part 2 for this situation (**Figure 2-1)**. Mr. Suplee said they've been separated. He referred to where the statute starts off by saying *(2) (a) For water bodies where the standard is more stringent than the condition of the water body but subsection (1) is not applicable*. It's a variance from a place where there's sort of a Legacy (mine) condition that maybe will get remediated at some point but the point-source discharger is essentially why this law not being asked to have to treat to that level quite yet until that cleanup occurs.

Mr. Suplee said when the workgroup has a chance to sit down and look at Part 2 and look at the guidance and think about where it applies, it will be clearer. Talking about both at the same time is kind of confusing. Ms. Kelly said that variances are in play in situations where there is some type of Legacy anthropogenic pollutant. Variances are not needed where the non-anthropogenic condition is greater

than existing criteria. In that case the onus is on the department to figure out what the correct standard should be, because the standard on the books is too stringent relative to what really naturally occurs out in the world.

Ms. Kelly said for the next meeting she will provide an example of the mass-loading balance and how DEQ successfully demonstrated the non-anthropogenic arsenic loading. She welcomed any comments from the workgroup on the draft rule and guidance, and said to take some time to read both draft rules for Part 1 and Part 2, that DEQ will address those comments in the next few weeks and the next meeting. Mr. Haight asked how much headway DEQ would need before the next meeting. Ms. Kelly said 2 weeks before the next meeting would be nice. Mr. Suplee added that the (Draft, Version 1) Guidance would go out after the meeting, and that it's a work in progress with a lot of gaps. He said if things are seen, especially in the last sections, that talk about data and data minimums and if that's an area where anybody has any interest in or thoughts about, to please send the information to them (Mr. Suplee, Ms. Kelly or Ms. Steinmetz) and it will be pulled together.

Ms. Kelly clarified that Part 1, Part 2, and the guidance will all be included in an email, that for the next meeting the workgroup will walk through those, and that DEQ will give a demonstration of natural for mass-balance loading for arsenic. She said they will be in a further stage with Part 2.

Ms. Kelly next asked about the (future) meeting dates. Mr. Suplee said that they are in field season, but he is always in Helena the third week of each month. Other than those weeks, he may not be at the meetings. He said that it would work well for him if they could schedule the meetings for those weeks he is here over the next few months. The meetings are scheduled as follows:

- Tuesday, July 26th
- Tuesday, August 16th
- Monday, September 19th
- Tuesday, October 18th
- Tuesday, November 15th

This schedule will also be emailed out to the group. Ms. Steinmetz followed up on one more question from the previous meeting about what parameters the workgroup's constituents were of concern. Aluminum was added to the other concerns of arsenic, iron, EC and SAR that had been talked about previously. Ammonia was also mentioned, which Mr. Suplee said doesn't fit with Part 1 and not much with Part 2, but that DEQ was doing a lot on it. The meeting adjourned at 3:27 p.m.